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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 840

BYRAM CONCRETANKS, INC.,

Petitioner,

vs.

WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO. INC., VINCENT DOTOLO, RICHARD DUNKLE, PATRICK E. HIGGINS, LEONARD J. FARMER, JOSEPH W. ROGERS, HULSE MOONEY, EDISON READ, JOHN W. KLEIN, FRANK M. BERRY, EDWARD STIERLI, JOHN EVERLY, E. BLAIR JOHNSON and BOARD OF HEALTH OF ROXBURY TOWNSHIP.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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Legend

R—a refers to appendix of petitioner in the Court of Appeals.

R—b refers to joint appendix of respondents in the Court of Appeals.

When name "Warren" is used, it refers to all respondents of the Warren combine, *viz.*, Warren Concrete Products Co. of N. J., Warren Concrete Tank Co., Inc., Vincent Dotolo and Richard Dunkle.

When name "Roxbury" is used, it refers to all respondents connected with Roxbury Board of Health, *viz.*: Patrick E. Higgins, Leonard J. Farmer, Joseph W. Rogers, Hulse Mooney, Edison Read, John W. Klein, Frank M. Berry, Edward C. Stierli, John Everly, E. Blair Johnson and Board of Health of Roxbury Township.

Wb— Warren's brief in the Court of Appeals.

Rb— Roxbury's brief in the Court of Appeals.

Pb— Petitioner's brief in the Court of Appeals.

T— Transcript of proceedings.

Pp— Petitioner's petition herein.

To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

This petitioner prays that a writ of *certiorari* issue to obtain review by this Court of a judgment of the United States Court of Appeals for the Third Circuit, entered on October 23, 1963, and a judgment of the said court denying a rehearing, entered on November 27, 1963.

A. Opinions Below

There was a two page letter opinion of the United States District Court for the District of New Jersey, dated December 14, 1962 (R 7a) unreported, addressed to counsel for all parties, by the Hon. James F. Coolahan, trial Judge. This is appended hereto as Appendix "A". The Court of Appeals filed a one page *per curiam* judgment, dated October 23, 1963, reported (C. C. A. 3d, 1963), 323 F(2) 904 (see Appendix "B"). In addition, in connection with efforts to obtain pretrial discovery, in an action for mandamus, a *per curiam* opinion was filed on or about January 19, 1961, by the Court of Appeals for the Third Circuit, which was reported as *Byram Concretanks, Inc.* v. *Honorable Thomas F. Meaney,* (C. C. A. 3d, 1961), 286 F(2) 170 (Appendix "C" herewith).

B. Jurisdiction

The judgment of the District Court was entered on December 28, 1962 (R 10a), dismissing the two causes of action and directing a verdict for defendants. On January 9, 1963 the petitioner docketed its appeal with the Court of Appeals for the Third Circuit (R 877a) (28 U.S.C.A. 1291). After the appeal was heard by the Court of Appeals, judgment was entered on October 23, 1963 affirming the judgment of the District Court.

Petition for rehearing in the Court of Appeals having been filed, judgment denying the same was entered on November 27, 1963. Upon timely application by the petitioner, pursuant to 28 U.S.C.A. 2101 and Rule 36(2) of the Rules of the United States Court of Appeals for the Third Circuit, a stay of the issuance of a mandate, originally set for January 2, 1964, was extended on January 10, 1964 by that court, to February 25, 1964.

The jurisdiction of this Court is invoked under 28 U.S. C.A. 1254(1) and under Rule 19(1)(b) of the Supreme Court of the United States.

C. Questions Presented

1. In a suit charging conspiracy in restraint of trade and the passage of an unconstitutional ordinance as a part of such conspiracy, did the Court of Appeals err: (a) in affirming the District Court, which dismissed two causes of action and directed a verdict in favor of the defendants, when plaintiff had rested; and (b) in depriving petitioner of a jury trial, in contravention of the Seventh Amendment to the United States Constitution?

2. Did the Court of Appeals deny due process to the petitioner when it predicated affirmance of the trial court's judgment on collateral estoppel or *res judicata,* which was not the finding of the trial court, which was not in issue and which had, therefore, not been briefed or argued by either side?

3. Where petitioner contended that corruption of municipal officials was part of a conspiracy to restrain trade, did the Court of Appeals err in affirming refusal to permit petitioner discovery of cash sales of corporate respondents and discovery of personal finances of local municipal officials?

4. Did the Court of Appeals err in affirming the District Court in rulings on admissibility of evidence and in quashing *subpoena duces tecum?*

D. Constitutional Provisions, Statutes, Court Rules, Ordinances, etc. involved

Constitution of the U. S.: Amendments V, VII and XIV.

Federal Statutes: 15 U.S.C.A. Secs. 1, 2, 7, 15, 26; 18 U.S.C.A. Sec. 709; 28 U.S.C.A. Secs. 1254(1), 1291 and 2101.

Rules of the United States Supreme Court: Rule 19(1)-(b).

Rules of the United States Court of Appeals for the Third Circuit: Rule 36(2).

Federal Rules of Civil Procedure: Rules 38, 43(a) and 50(a).

State Statutes: N.J.S.A. 58:11-25 and 58:11-33. Appendix "E".

Miscellaneous

Regulations: N. J. State Dept. of Health, Standards of Construction, etc., Secs. 5.1, 5.6, 5.12, 5.13 (Ex. P-16, R 401a);

Ordinance: Township of Roxbury (Ex. P-16, R 402a);

Minutes and Resolutions of Roxbury Board of Health: March 19, 1953 (Ex. P-14; R 390a), May 13, 1958 (Ex. P-17, R 404a).

Since it is not the purpose or function of this petition for *certiorari* to serve as a brief on the merits, the "miscellaneous" items are not set out herein, but reference is made to petitioner's appendix before the Court of Appeals, where such statements may be found.

E. Statement of the Case

This is an anti-trust suit, charging conspiracy in restraint of trade, commenced in the United States District Court under 15 U.S.C.A. 1, 2, 7, 15 and 26, praying in the First Cause of Action: 1) for an injunction against the Roxbury respondents, restraining them from giving War-

ren a monopoly in the sale of concrete septic tanks[1] in Roxbury; 2) for an injunction against the Warren respondents from continuing the conspiracy in the sale of septic tanks in Roxbury and elsewhere; 3) against all the defendants, for treble the amount of damages sustained; and, in the Second Cause of Action; 4) for an injunction restraining the Roxbury respondents from interfering and discouraging petitioner and others from selling in the Roxbury market, and other rights of the petitioner under the Fifth and Fourteenth Amendments of the United States Constitution; and 5) for a court decree setting aside a resolution of March 19, 1953 adopted by the Board of Health of Roxbury and an ordinance, dated December 18, 1958, adopted by the Township of Roxbury (R 15a, *et seq.*).

Efforts to obtain pretrial discovery in the United States District Court for the District of New Jersey, that would directly link the Warren and Roxbury respondents into this conspiracy, were frustrated (discussed *infra* pp. 22). At one point, when Judge MEANEY refused to respect the order of Chief Judge SMITH, who sat on motions during the former's vacation, petitioner felt impelled to bring an action in mandamus before the Court of Appeals. That court denied the application, holding that this was a matter for review by appeal and not by mandamus; *Byram* v. *Meaney* (C.C.A. 3d, 1961), 286 F(2) 170.

Sometime before the pretrial conference, for reasons unknown to petitioner, the case theretofore assigned to Judge MEANEY was transferred to the HON. JAMES F. COOLAHAN, who sat at the trial.

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[1] A septic tank is used on realty improvements for the reception of waste, wherever the area involved is not on public sewers and constitutes a private utility regulated in the State of New Jersey, by N.J.S.A. 58:11-23, *et seq.*, as a means of avoiding water pollution.

Mr. Dotolo was subpoenaed by petitioner as an adverse witness and commanded to bring with him delivery tickets and other records which petitioner felt were necessary properly to prosecute its suit, some of which Judge MEANEY had ruled could be had at the trial. This subpoena was quashed by Judge Coolahan (R 31a, 66a).

During the trial, as the record shows, Judge COOLAHAN repeatedly and systematically excluded relevant evidence sought to be introduced on behalf of the petitioner, and otherwise harassed petitioner during the trial. At its conclusion, petitioner felt impelled to move for a mistrial, which was denied[2] (R 6a), for actions of the court during trial (see *e.g.*, R 235a, R 297a, *et seq.*). Nonetheless, the following testimony of unimpeached and uncontradicted witnesses, did get into evidence at the trial:

Petitioner, a small manufacturer (R 40a), commenced business in Mine Hill Township, Morris County, New Jersey, just outside of Roxbury Township, in 1955, and because of vandalism (T 74) moved to Route 206, Byram Township, Sussex County, New Jersey in 1957 (R 26b, 39a). It manufactures *rectangular* concrete septic tanks (Ex. P-13, R 389a), and does an intrastate business in several counties (R 43a).

The Warren respondents, admittedly the largest purveyor of concrete products in the State of New Jersey (R 201a), doing an interstate business (Ex. P-6, R 383a), manufacture *round* concrete septic tanks, on Route 9, Waretown, Ocean County, New Jersey (Ex. P-3, R 379a, *et seq.*). As part of a functionally segregated enterprise, Warren has a manufacturing company, and a separate selling company (R 196a). A separate partnership, Vindico, owns

[2] This denial was not urged as grounds for reversal at appellate level. It is stated merely as background material.

and leases the plant, property and equipment to Warren. All these organizations, including the partnership, Vindico, are controlled by the same Warren officers, Messrs. Vincent Dotolo and Richard Dunkle (R 100a). In 1955 Warren respondents sold 3300 septic tanks. By 1959, its sales had risen to 6600 tanks (R 106a).

Warren's sole aim was to demonstrate its "superiority", by cornering the market, using the health inspection services as its vehicle, thereby preventing comparisons with the competition. In 1953, it succeeded in obtaining a monopoly in Roxbury (R 59b). The Board of Health of Roxbury passed a resolution on March 19, 1953 giving Warren an exclusive franchise, designating the "Keystone" (Warren) tank, by name, and adding "or one that equals or exceeds the same", as the only acceptable tank i Roxbury (Ex. P-14, R 371a, 390a). No standards were set as to what shall constitute "equal" or "exceed". Petitioner contends that this was special legislation in disguise, and made Warren and Roxbury partners in the conspiracy.

Thereafter, Warren's non-complying tanks[3] were found to be "more equal" than the complying tanks of petitioner or any other manufacturer. From 1953 to 1958, under this resolution, about 800 concrete septic tanks, practically all of the concrete tanks delivered in Roxbury Township, were installed by Warren (R 365a, *et seq.*, 371a).

Not to leave any tell-tale evidence of lack of compliance with the law, Mr. Higgins, the sanitary inspector, one of the respondents, kept no record of inspections (R 367a). He testified he kept the record of inspections "in his head" (R 368a) and made no measurements of the tanks (R 373a). No one ever supervised his work (R 372a). He had or-

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[3] See discussion, *infra*, on non-compliance of Warren tanks, p. 10, and Appendix "D" for details.

ders to accept only Warren's (round) tanks (R 174, *et seq.*). Another respondent, Rogers, testified that there were no such orders issued to Higgins (R 338a).

Warren advertised its product by false and fraudulent advertising (Ex. P-3, R 379a-381a), in violation of criminal laws (Title 18 U.S.C.A. Sec. 709) (R 233a). The F.H.A. and V.A. had to ask Warren to cease, desist and discontinue this practice (R 233a, *et seq.*). Warren also circulated a brochure to the trade entitled: "What Kind of a Sanitary Disposal System Should You Have?" (Ex. P-11, R 388a, 124a). In it appeared the statement, italicized a number of times: "See Your Health Inspector First". This reversed the requirement of N.J.S.A. 58:11-33 (Appendix "E"), which called for seeing him last, when the system was ready for inspection.

What was calculated to have been the danse macabre for petitioner, began in 1957. In that year, Warren instigated and Roxbury carried out, a massive campaign of vilification of petitioner's products, outlawing its tanks in Roxbury by means of arbitrary rejections (R. 161a, 162a, 171a, *et seq.*), and by resorting to threats of sanctions and secondary boycotts against petitioner's customers, if they used petitioner's products (R 172a). Thus, a total of about 26 known customers were lost to petitioner (R 149a, *et seq.*). Petitioner was not permitted to go into the reasons why these customers were lost (R 151a).

Warren went in for business feudalization. It repeatedly sought to make distributors or dealers of his manufacturer-competitors, and succeeded in doing so in two instances (R 170a, Ex. P-10, R 120a, 386a, 387a, 119a, R 71b, *et seq.*). When petitioner refused to heed the "persuasions" of Mr. Vincent Dotolo, threats of a price war were made and carried out against petitioner (R 157a, 170a), and promise of trouble with municipalities and its inspec-

tors, which would outlaw petitioner's tanks. According to Mr. Dotolo, the only way petitioner could market septic tanks was under the protection he could furnish if petitioner became his distributor (R 170a, *et seq.*).

To show petitioner he meant business, Mr. Dotolo, operating from Warren's plant, about 150 miles from petitioner's, began to assert his commercial "manhood". He laid siege to petitioner's market by ringing it with dealers, one of them on Route 206, only ¼th of a mile away from petitioner's plant (R 99a, 289a).

Warren went in for freight absorption, regardless of transportation differentials, and discriminatory pricing under a hocus-pocus sliding scale of prices, for the obvious purpose of destroying competition (R 222a, 145a, 146a, 279a, Exs. P-7, P-8, P-9, R 384a, *et seq.*, R 108a, 109a, 110a, 220a, 248a).

To gain this monopoly position, Warren also went in for corruption. Petitioner contends that the lubricant used was cash, derived from cash sales (R 63b, 121a, 122a), from fictitious unpaid accrued royalties (R 206a, *et seq.*) and from alleged selling expenses (R 227a, *et seq.*). Mr. Dotolo did not know whether these selling expenses aggregated $5 or $100,000 per annum (R 228a). Mr. Dotolo conceded Warren had a public relations program, "using its salesmen as contacting agents with municipal officials", to "acquaint them with Warren products" (R 113a).

Petitioner's president testified that in the year 1959 it had made over 20 cash sales, running into several thousand dollars (R 61a). Petitioner's expert, a N. J. certified public accountant[4], testifying from the books and records, stated

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[4] His statement determining losses arising from the conspiracy (Ex. P-43 for Ident., R 415a), showed total tank sales for that year was 285 (R 32b). That exhibit was not permitted to go into evidence (R 415a). See p. 27 *infra*, where non-admissibility is asserted as error.

that in that year petitioner had made no fewer than 29 cash sales (totalling $1,928.16) (R 362a). Warren admitted it had a special dispatcher as a regular employee, whose duty was to collect cash sales and to arrange "for cash and credit settlement". Nonetheless, Mr. Dotolo would have the court believe he had only one cash sale of one tank, amounting to $140.—, of a total of 6600 tanks sold in 1959 (R 122a, 383a).

Warren had apparently adulterated its product. Although it had tried, it had never succeeded in obtaining from the New Jersey State Department of Health, official recognition that its concrete septic tanks complied with Chap. 199, N. J. Laws of 1954 (N.J.S.A. 58:11-23, *et seq.*) (R 202a). Warren's tanks violated "Standards for the Construction of Sewerage Facilities, etc." (Ex. P-3, R 379a-381a), promulgated by the State Department of Health, pursuant to Chap. 199, Laws of 1954 (N.J.S.A. 58:11-23, *et seq.*). By short-sizing the tanks (as against the printed gallonage) (R 178a, 221a), in addition to violating the law as to capacity, Warren was also picking the consumer's pocket. Nonetheless, Roxbury accepted these tanks without question and without inspection (R 367a, R 12b). At the trial, petitioner was not permitted to introduce evidence from the lips of engineers to show these violations by Warren tanks (R 55a, 354a). The District Court, however, did permit the brochure of Warren to be put in evidence (Ex. P-3, R 379a, *et seq.*). The drawings, a part of this brochure, show *prima facie* that Warren's tanks do not comply with the requisite sections of "Standards" (Ex. P-16, R 401a). See Appendix "D" of this petition for details of these violations.

Tests made by a licensed civil engineer showed that petitioner's tanks met all tests, including a load test that in-

dicated its tanks could stand two to three times the load they might be expected to meet (R 352a-354a). The New Jersey State Department of Health found that they met the minimum requirements laid down in the New Jersey "Standards" (Ex. P-32, R 411a, 412a). Likewise, petitioner met F.H.A. requirements (Ex. P-13, R 389a). Nonetheless, on 4 separate occasions (R 127a-141a), Roxbury rejected petitioner's tanks (R 307a, 308a, 372a) to be replaced, apparently, by Warren tanks (R 137a, 374a). Thereafter petitioner no longer tried to sell tanks in Roxbury.

These rejections were obviously arbitrary and groundless, as revealed by the testimony of petitioner's president (R 127a-141a) and by an exchange of letters between respondent Mr. Higgins, the inspector, and Frankel & Frankel. In his answers, Mr. Higgins blossomed forth with a show of rhetoric rarely equalled. The reasons given by him for the rejections were only pretenses, designed to give petitioner a feeling of futility. Everything was done by him to create an image of Warren as the only acceptable tank manufacturer in Roxbury Township and to make operations of petitioner so unprofitable that it would abandon manufacturing and come in as Warren's distributor (Ex. P-15, R 391a, *et seq.*).

To establish arbitrariness, petitioner had two of these rejected tanks inspected by licensed professional engineers, who testified at the trial. They both pronounced them sound and in conformity with law (R 50a, 54a). The Board of Health of Roxbury Township, intoxicated with power, passed a resolution on May 13, 1958 (Ex. P-17, R 404a, 405a), thereby ratifying the acts of its inspector in rejecting the Byram tanks.

To buttress an obviously weak position and as part of the conspiracy,[5] Roxbury respondents passed a preclusive ordinance on December 18, 1958 (Ex. P-16, R 403a).

Feeling itself aggrieved by these conspiratorial acts of the respondents, petitioner instituted the within suit on December 12, 1959, in the United States District Court for the District of New Jersey (15 U.S.C.A. 7).

After suit and before trial in the federal court, there was a wholesale exodus by the Roxbury respondents, a number of them even leaving the community.[6] Also, the two owners of Warren respondents bailed out.[7]

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[5] Should *certiorari* be granted, petitioner is prepared to show that passage of the ordinance by Roxbury Township, as part of the conspiracy in restraint of trade, is an unconstitutional assumption of power; and Section III of such ordinance is an unconstitutional delegation of power (Ex. P-16, R 403a, R 111b). The requirements of N.J.S.A. 58:11-33, make inspections mandatory. Under this vague, obscure, indefinable, preclusive ordinance, Roxbury predetermined acceptability of a manufacturer's product in advance of delivery of their product, on the basis of drawings submitted. This is contrary to Chap. 199, Laws of 1954 (N.J.S.A. 58:11-23 *et seq.*) and, indeed, repeals it.

[6] The captain of the Roxbury team, the man who engineered the meeting that gave rise to the May 13, 1958 resolution, Mr. Leonard J. Farmer, President of the Roxbury Board of Health, deserted his teammates when he went to work in Wilmington, Delaware, and was not present at the trial (R 326a, T 4); Hulse Mooney quit as assessor and as member of the Board of Health of Roxbury (R 311a); Edison J. Read resigned (R 316a); John N. Klein and Frank Berry quit when their respective terms were up (R 326a, 330a); John H. Everly quit before his term was up (R 317a), and E. Blair Johnson quit after only 4 months on the Board (R 303a).

[7] Richard Dunkle sold out his 50% interest in 1961, and was not present at the trial (T 3). Mr. Vincent Dotolo then sold 60% of his 50% interest in the Warren companies, leaving him with a 20% interest in the companies (R 201a).

Trial was moved before the HON. JAMES A. COOLAHAN, Judge, and a jury, on November 27, 1962 and continued thereafter for 8 days. After petitioner rested, Judge COOLAHAN dismissed the jury with these words (T 1233):

> The Court: "All right, we will continue until Monday morning. You will be excused until Tuesday and if your attendance is required the clerk will notify you by telephone on Monday.
>
> "Monday we have other matters on and this case will not be tried other than motions, which are legal motions, which you couldn't be in to hear anyway. So you will receive your notification on Monday from the jury clerk with respect to your services on Tuesday, if necessary.
>
> "Now, is that understood?
>
> "Juror No. 10, you go to Florida and have a good time."

On the morning of December 11, 1962, motions for dismissal of both causes of action were made by the two sets of respondents. These motions for directed verdict were granted by the court. Letter opinion, dated December 14, 1962, by the HON. JAMES A. COOLAHAN, followed (Appendix "A"). Judgment of dismissal "with costs" was entered on December 28, 1962.

Notice of Appeal was filed on January 9, 1963 in the Court of Appeals for the Third Circuit. The appeal was heard on September 23, 1963. Judgment was entered by the Court of Appeals on October 23, 1963 "with costs". Petition for rehearing was denied, without opinion, on November 27, 1963. Motion for a stay of the mandate was made on December 24, 1963. On the 10th day of January, 1964, that motion was granted. It extended the time for entering the mandate, to February 25, 1964.

F. Reasons for Granting the Writ

I. The decisions below conflict with the purposes of Congress, with this Court's decisions, with those decisions in other circuits, and even with those within the circuit, which impose liability on those who conspire to monopolize, and provide for recovery of damages by those who suffer from the natural consequences of the wrongful acts.

This unique case presents a question of great public importance involving a conspiracy between a commercial enterprise and municipal officials, that gave monopoly position within township borders of Roxbury to the former, and untaxed income to the latter.

The closing of the Roxbury market to the petitioner was a denial of the equal protection of the laws, in abrogation of the XIVth amendment to the United States Constitution, and a denial of the democracy of the market, which the Sherman Act guarantees.

Unless enjoined, the practices herein enumerated, not only constitute a threat to individual liberty and free enterprise, but open wide the doors to municipal corruption and its concomitant evasion of the Internal Revenue Laws.

1. The District Court had jurisdiction as to the first cause of action, seeking to enjoin the aggressive potentialities of the respondents, and damages for wrongs already done. As seen above, that court rested its decision on the two page letter of December 14, 1962 (Appendix "A"), citing *Parker* v. *Brown*, 317 U. S. 341 (1943). Parker involved state legislation, which had the same application to everybody in the raisin-growing industry throughout the state (California), and did not discriminate against any grower. The enabling act in New Jersey, Chap. 199, Laws

of 1954 (N.J.S.A. 58:11-23 *et seq.*), did not authorize Roxbury to go in for preclusive acts. Parker is, therefore, inapposite. In affirming the action of the District Court, the Court of Appeals nullified the salutory purposes of the Sherman Act and the cases decided by this Court, *viz.*: *Georgia* v. *Evans*, 316 U. S. 159 (1942); *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390 (1906); *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 239, 240 (1922); *Pennoyer* v. *McConnaghy*, 140 U. S. 363, 366 (1891); *Bankers Life and Casualty Co.* v. *Holland*, 346 U. S. 379, 384 (1953); *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 598 (1951); *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 226 (1947); *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 110 (1959). What we distill from these cases is that jurisdiction was here present, and that neither the Board of Health of Roxbury, the members thereof, nor its inspector, enjoy any special exemption or special immunity under the Sherman Act, civilly or criminally.

2. The District Court had jurisdiction of the second cause of action, seeking to set aside a resolution dated March 19, 1953, passed by the Roxbury Board of Health, and a determination of the constitutionality of the ordinance of December 18, 1958, passed by the Township of Roxbury, which petitioner contends repealed Chap. 199, N. J. Laws of 1954 (N.J.S.A. 58:11-23 *et seq.*), was tailored to continue the conspiracy. *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U. S. 306 (1905) (in which an ordinance granting a monopoly in garbage collection was considered); *Meredith* v. *Winterhaven*, 320 U. S. 228, 234, 237 (1943) (wherein a question of state law was decided); *United Enterprises, Inc.* v. *Dubey* (5th C. C. A., 1942), 128 F(2) 843, 844 (where state statute was considered, even where there was no prior determination by state court); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886)

(where delegation of naked arbitrary power was considered).

3. Whether interstate commerce is affected, depends not necessarily upon petitioner's commerce, but as well on commerce of respondents, Warren. The latter's sales, admittedly made both in New York and New Jersey, brings this case within the Sherman Act. Once interstate commerce is established, the Sherman Act may be applied to "local" restraints on commerce, without proving public injury. *Klors* v. *Broadway-Hale Stores*, 359 U. S. 207, 213 (1959); *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, 118, 119 (1955); *United States* v. *Women's Sportswear M'frs Ass'n*, 336 U. S. 460, 464 (1949); *United States* v. *Employing Plasterers Ass'n*, 347 U. S. 186, 189 (1954). This would seem to dispose of *Radiant Burners* v. *People's Gas Co.*, 364 U. S. 656, 660 (1961), cited by the trial court, which actually supports the petitioner's position.

4. On the subject of damages, precise proof was unnecessary. The question is what profit petitioner would have enjoyed under free competitive conditions. *Bigelow* v. *R.K.O. Radio Pictures*, 327 U. S. 251, 264 (1946). Petitioner need only show unreasonable restraint of trade and that it suffered injury. Damages may be uncertain in amount. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 561 (1931). They may be partly estimates and partly factual and as definite and certain as the subject matter admits. *Eastman Kodak Co.* v. *Southern Photo Material Co.*, 273 U. S. 359, 379 (1927); *Connecticut Importing Co.* v. *Frankfort Distillers* (C. C. A. 2d, 1939), 101 F(2) 79, 81; *William H. Rankin Co.* v. *Associated Bill Posters of U. S.* (C. C. A. 2d, 1930), 42 F(2) 152, 155; *Frey & Son* v. *Welch Grape Juice Co.* (C. C. A. 4th, 1917), 240 F. 114, 117; *William Goldman Theatres* v. *Loew's*, 69 F. Supp. 103, aff'd (C. C. A. 3d, 1947), 164 F(2) 1021, cert. den. 92 L. Ed. 1742.

II. Petitioner, against whom a directed verdict was ordered by the trial Court, affirmed by the Court of Appeals, was deprived of a jury trial, in contravention of the Seventh Amendment to the United States Constitution and Rule 38 of Federal Rules of Civil Procedure.

We confess our inability to harmonize the convincing evidence marshalled by the petitioner at the trial with the directed verdict of the trial court and the affirmance by the Court of Appeals.

The right to trial by jury is firmly embedded in American jurisprudence. This Court does not look with favor on any erosion, whittling away, or denial of that right. See *e.g., Gollowy* v. *United States* (minority opinion), 319 U. S. 372, 407 (1943); *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 504 (1959); *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 696 (1962), cases where this Court has reaffirmed the importance of the Seventh Amendment. Joint Statement of Mr. Justice BLACK and Mr. Justice DOUGLAS on the Rules of Civil Procedure, and the proposed amendment of Rule 50(a), did not "approve of this sapping of the Seventh Amendment's guarantee" by means of a "technical coup de grace" (9 L. Ed. 2d, lxvi).

While no standard or formula can be framed as to the *quantum* of proof, to guide the trial judge in the direction of a verdict or in the denial of it, the Second Circuit made the following suggestion to trial judges in *Fratta* v. *Grace Line, Inc.* (C. C. A. 2d, 1943), 139 F(2) 743:

> "We take the occasion to suggest to trial judges that, generally speaking—although there may be exceptions—it is desirable not to direct a verdict at the close of the evidence, but to reserve decision on any motion therefor and to allow the jury to bring in a ver-

> dict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight of the evidence and grant the motion, Rule 50(b), with the consequence that if, on appeal, we disagree with him, we will be in a position to reinstate the verdict, thus avoiding the waste and expense of another trial."

The more so does this suggestion carry weight where, as here, the suit is one in anti-trust, involving a protracted trial and a lengthy and expensive record.

The threats carried out by Mr. Dotolo (R 170a), coupled with the later arbitrary rejections in Roxbury (R 273a) of petitioner's complying rectangular tanks, and the exclusive admission of non-complying round tanks of respondent Warren (Ex. P-3, R 379a, 190a, 191a), without more, show *prima facie* that respondents had a common design, purpose and understanding that spell out a conspiracy. This evidence and the inferences to be drawn therefrom, were sufficient to submit the issue to the jury. *Wilkerson* v. *McCarthy*, 336 U. S. 53, 57, 62 (1949); *Webb* v. *Illinois Central R. Co.*, 352 U. S. 512, 514 (1957).

A threat of reprisals made to a competitor is a completed overt act, illegal in itself under the anti-trust laws, *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.* (C. C. A. 1st, 1932), 57 F(2) 96, 101. Suppressing competition by unfair methods, is likewise a violation. *Ibid.* p. 102.

It is not the function of the court to search the record for conflicting circumstantial evidence to take the case away from the jury, *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 110 (1959).

It is not for the judges to resolve debatable issues of fact on which fair-minded men might differ, *Stone* v. *New York C. & St. L. R. Co.*, 344 U. S. 407, 409 (1953). For the judges to do so, violates the command of the Seventh

Amendment to the Federal Constitution, *Atlantic Gulf Stevedores, Inc.* v. *Ellesman Lines, Ltd.*, 369 U. S. 355, 359 (1962); *Byrd* v. *Blue Ridge Rural Electric Co-op, Inc.*, 356 U. S. 525, 537 (1958). Conflicting inferences and conclusions raise a question for the jury, *Dovie Ray Baker* v. *Texas & Pacific R. Co.*, 359 U. S. 227, 229 (1959). Fact finding by the jury does not require mathematical certainty, *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, 526 (1956). Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can be fairly drawn, *Schulz* v. *Pennsylvania R. Co., supra*, p. 526. Even if each of the several acts alleged to have been done in furtherance of the alleged conspiracy might not alone constitute any federal offense (here denied), it is of no consequence, if taken together, the intent and purpose was to restrain interstate commerce. The plan may make the parts unlawful, *Swift & Co.* v. *U. S.*, 196 U. S. 375, 395, 396 (1905); *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312 (1923). The object and intent of the combination determines its legality, *Loewe* v. *Lawlor*, 208 U. S. 274, 297 (1908). This would seem to dispose of *Schad* v. *Twentieth Century Fox Film Corp.* (C. C. A. 3d, 1943), 136 F(2) 991, cited by the trial court in its December 14, 1962 letter (Appendix "A").

III. The Court of Appeals has sanctioned or so far departed from the accepted and usual course of judicial proceedings, as to make such action tantamount to a denial of due process, in contravention of the Fifth Amendment to the United States Constitution.

That it was necessary for the Court of Appeals in its *per curiam* judgment, to make a conclusion of an ultimate fact, not found by the District Court, and at variance with

an action pursued at the state court level, is proof *per se* that the sweeping unexplained affirmance had to be buttressed by something. With all deference, the Court of Appeals erroneously assumed as a fact that an earlier state court action brought by petitioner against Roxbury respondents only, for vilification of its products, which was summarily dismissed without trial, constituted collateral estoppel or *res judicata* in the federal suit charging conspiracy in restraint of trade. That, the Court of Appeals could not do as a matter of law, considering the evidence.

That the cause of action in the federal court is factually vastly different from the one in the state court, is best delineated by an examination of the Statement of Facts in each of the briefs in the Court of Appeals: *viz.*, Warren defendants (Wb 7); Roxbury defendants (Rb 10, 26); and petitioner (Pb 17). See also an excerpt from affidavit in opposition to motion to strike complaint (R 18a).

As the Relevant Docket Entries of the District Court reveal, a motion was made by Warren defendants for summary judgment, on the ground that the matter was *res judicata* (see R 421a, annexed to this petition) (Appendix "G"). After argument, the motion was withdrawn (see Relevant Docket Entries, R 1a, 2a). It is significant that the Roxbury defendants, most involved in this question, did not move against the complaint on any like ground. By their silence on this score, the Roxbury defendants conceded that no grounds for the claim of *res judicata* existed.

Neither the petitioner in its appendix, nor Roxbury or Warren defendants, in their joint appendix (R 1b, *et seq.*) included any of the motion papers or affidavits in support of or in opposition to the claim of *res judicata*, because it was recognized by all parties that this claim was without any basis.

The State of New Jersey has no anti-trust statute, nor was the complaint in the state court grounded in anti-trust. Therefore, the state court had not the power to and could not render a decision on anti-trust matters. Neither collateral estoppel nor *res judicata* could apply here. *cf. United States* v. *Radio Corp. of America*, 358 U. S. 334, 352 (1959).

The issue in the state court was whether there had been illegal interference with petitioner's business by a municipal Board of Health, its members and inspector. Warren was not a party to that suit. In the federal court, the issue is whether Sections 1 and 2 of the Sherman Anti-Trust Act have been violated by a monopolist in conspiracy with municipal officials. These issues are incompatible and unequatable. The anti-trust law has a broader application than the prohibition of restraints of trade unlawful at common law. *Loewe* v. *Lawlor*, 208 U. S. 274, 297 (1908).

The normal rule is that a prior judgment need be given no conclusive effect at all, unless it establishes one of the ultimate facts in issue in the subsequent proceeding. *Yates* v. *U. S.*, 354 U. S. 298, 338 (1957).

Even assuming, however, that the prior state action was one in anti-trust, here stoutly denied, it could not bar the instant suit for subsequent anti-trust acts, by the same defendants, and by other defendants joined as conspirators in this suit, where there were allegations of new or continuing anti-trust violations. *Lawler* v. *National Screen Service Corp.*, 349 U. S. 322, 329 (1955). The raising of this issue by an appellate court, without petitioner being afforded an opportunity to meet it by brief and oral argument, constituted a denial of due process.

IV. Two Courts below have narrowly decided an important question of discovery under Federal Rule 34, which has not been but should be settled by the United States Supreme Court.

The District Court and the Court of Appeals refused to look at the "facts" of economic life and the means employed that condition current economic traffic.

Corruption in the inspection services, as here alleged is one of those means. Involving as it does the building materials, and ultimately the housing industry, the corruption lays a heavy tribute on resources of home owners, lowers living standards and is fraught with great peril to the sacred trust committed to our public officials.

Petitioner had pleaded in its First Cause of Action, that the relationship between Warren and Roxbury had been infected by a corrupt bargain (R 14a). As seen above, respondent Warren had stated, in answer to interrogatories, that in 1959 it had but one cash sale (R 122a).[8] Seeking to show that cash was used by Warren to corrupt Roxbury, petitioner moved before Judge MEANEY to inspect original delivery tickets, which would show which were sales for cash and which sales for credit.[9] This motion was first granted. Later, after Warren asked to be relieved from its operation, the motion was denied (R 18a) (Transcript of motion November 28, 1960, filed December 16, 1960) (R 24a) (Transcript of motion January 23, 1961, not filed).

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[8] That this was incredible is attested by the fact that petitioner, having a sales volume of about 4½% of Warren's had made over 20 cash sales, totalling $1,928.16, in that year (Ex. P-43, for ident., R 61a; 362a, R 32b).

[9] They would also show whether Warren, when specified by the municipality, was in a position to demand cash. See Appendix "F", item 12.

In denying the motion, however, Judge MEANEY had stated that these delivery tickets could be subpoenaed for the trial, to test out the truthfulness of any answers made by respondents Warren (R 22a). As seen above, petitioner did subpoena them for the trial. The trial court (Judge COOLAHAN sitting) summarily quashed the subpoena calling for these delivery tickets (R 66a).

A party to an anti-trust suit cannot insulate itself against discovery and disclosure of the facts that would tie him into the conspiracy, *Quemos Theatre Co., Inc.* v. *Warner Bros. Pictures, Inc.*, 35 F. Supp. 949, 950 (D. C. N. J., 1940). The question in these cases is always whether the annoyance or damage from disclosure in discovery will outweigh the injury to a party and to the public from the disallowance of such discovery. Even if complete discovery were not deemed advisable or essential in the instant case, partial discovery by the method of sampling a representative month's delivery tickets, should have been permitted to determine what cash sales were made. *Empire Rayon* v. *American Viscose Corp.*, 2 F. R. Serv. 2nd 34.42 case 4; *Shawmut, Inc.* v. *American Viscose Corp.*, 15 F. R. Serv. 30b.352 case 1, 11 F. R. D. 562; *Schenley Industries* v. *Industries Products Co.*, 19 F. R. Serv. 30b.35 case 1, 16 F. R. D. 13.

Warren's objections to the inspection of delivery tickets, were that they were trade secrets (R 10b). However, there is nothing sanctimonious about a competitor's records and prices, in anti-trust suits. *Byers Theatres, Inc.* v. *Murphy* (U. S. Dist. Ct. W. D. Va., May 20, 1941), 3 F. R. S. 34.41, case 5; Dept. Just. Bull., No. 79; 1 F. R. D. 286. In that action the court stated (p. 288):

> "Nor do I think the prices, as shown by the contracts, partake of the nature of trade secrets or are confidential to such an extent as to give them any particular sanctity, and such prices may be quite relevant."

From the Roxbury respondents, plaintiff sought answers to interrogatories which would show unreported property or income, in order to create an inference that bribe money had passed. All such interrogatories dealing with their personal financial affairs, which would show unaccounted income or property, were stricken *in toto* by Judge MEANEY (R 28a). Representative samples of the questions asked are found in R 25a-28a. In brief they sought:

a) An analysis of the respondents' bank deposits;

b) Proof of expenditures;

c) Proof of increase in net worth.

These same methods are now being used by the Federal Government to track down tax evaders and racketeers. In *Jelaza* v. *United States* (4th C. A., 1950), 179 F(2) 202, the government employed the expenditure, bank deposit and net worth increase evidence, to show corrected net income. In *Holland* v. *United States*, 348 U. S. 121, 129 (1955), the net worth approach was used by the government.

Thus, petitioner was frustrated in its quest to find out who got what, when and where. The two courts below took a timorous judicial approach to the subject of discovery that would show corruption of municipal officials[10]

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[10] *cf.* That there is an undoubted obligation on the part of public officers to disclose their financial affairs, is best summed up in the following quote from "The Public Papers and Addresses of Franklin D. Roosevelt", Vol. I, p. 583, Random House, New York (1938). a Memorandum on the Removal of Sheriff Thomas A. Farley of the County of N. Y., February 24, 1932 (who refused to answer questions concerning his personal finances):

"The stewardship of public officers is a serious and sacred trust.

(Continued on following page)

as being monopolistic, affecting as it does price and quality of the product, and the impoverishment of the competition.

V. The Court of Appeals, by approving the rulings of the trial Court as to exclusion of evidence, has so far sanctioned such a departure of judicial proceedings by a lower Court, as to call for an exercise of this Court's power of Supervision.

Both in the denial of pretrial discovery (R 25a-28a) and in the admission and exclusion of evidence, the trial court revealed a fixed determination to exclude all evidence that would directly link Warren and Roxbury in a conspiracy, the absence of which would furnish the grounds for a directed verdict of dismissal. See *infra* and "Other Items of Exclusion of Evidence, Appendix "F": Although petitioner charged in its complaint that Warren respondents had been guilty of illegal conduct in Roxbury and elsewhere (R 12a), and had sought an injunction against it in Roxbury and elsewhere (R 15a), Roxbury alone, of all the municipalities where Warren operated, was made a party. The trial court accordingly restricted all evidence just to Roxbury (R 44a, 55, 332a, 401a, 418a).

The rulings objected to raise important questions concerning the admissibility of evidence in an anti-trust suit. The broad discretion and great latitude permitted by Rule

(Continued from preceding page)

They are so close to the means for private gain that in a sense not at all true of private citizens, their personal possessions are invested with a public importance in the event their stewardship is questioned. One of their deep obligations is to recognize this, not reluctantly, or with resistance, but freely. *It is in the true spirit of public trust to give, when personally called upon, proof of the nature, source and extent of their financial affairs.*" (Emphasis ours.)

43(a) of the Federal Rules of Civil Procedure, in the matter of reception of evidence, was not followed by the trial court. Neither was *United States* v. *General Electric Co.*, (D. C. N. J., 1949), 82 F. Supp. 753, 903[11] (an anti-trust case).

Petitioner, however, does not have to prove an unlawful agreement. It may be inferred from other evidence, which taken together creates more than just a coincidence. *National Appliance Corporation* v. *Manitowoc Company*, 311 F(2) 896, 900 (C. C. A. 7, 1963). Where parties have veiled their conspiracy, as here, and have said that they do not know each other (R 100b, 68b), this Court may consider it an incredible and an amazing coincidence and hold a conspiracy was proved, as was done in *Ball* v. *Paramount Pictures*, 169 F(2) 317, 319 (C. C. A. 3rd 1948).[12]

The trial court looked upon the actors here as never having stepped on the same stage, and as never having acted in the same play. A curtain of verbiage was erected by the respondents to separate them. A conspiracy, however, is a partnership, and each conspirator is the agent of the other. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249 (1917); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254 (1940); *Feswick* v. *United States*, 329 U. S. 211, 217 (1946); *United States* v. *Gooding* (U. S.), 12

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[11] Judge FORMAN, who sat in that case, indicated the latitude and longitude of Rule 43(a). He is now a Judge of the 3rd Circ. Court of Appeals, but was not among the judges who considered either the appeal or the petition for rehearing in this case.

[12] Judge MCLAUGHLIN, writing for that court (p. 319), quoted from "Temporary National Economic Committee, Mimeograph" No. 16, p. 15:

> "The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age."

Wheat. 460, 475, 6 L. Ed. 693 (1827); *Lutwak* v. *United States*, 344 U. S. 604, 617 (1953); and where proof aliunde existed that Warren defendants were connected with the conspiracy, declarations by one are admissible against the others. *Schine Chain Theatres, Inc.* v. *U. S.*, 334 U. S. 110, 116 (1948); *Glasser* v. *U. S.*, 315 U. S. 60, 74, 80 (1942).

As seen above, questions dealing with arbitrary and capricious rejections of petitioner's acceptable products and illegal acceptance of Warren's non-complying products, were held inadmissible under the restrictive trial court policy (R 44a, 48a, 55a, 56a). That this arbitrary and capricious practice is monopolistic is too clear to require the citation of authorities on admissibility.

So, too, where the salesman's instructions were to sell to anybody within the area, evidence which would show that Warren used its salesmen in seeking to make a distributor out of petitioner (R 289a, 141a-145a, 197a), was admissible. 2 *Am. Jur., Agency*, 2d, sec. 69, *et seq.*; 2 Mechem, Agency (2d), sec. 1785. Questions showing relative size, that would indicate relative economic power, *United States* v. *Aluminum Co. of America*, 148 F(2) 416, 445 (C. C. A. 2d, 1945) were likewise admissible (R 41a). These were all excluded.

On the subject of petitioner's damages, the District Court refused:

a) To admit Ex. P-43, for identification (R 414a), which would show by petitioner's expert accountant, that $58,000 was lost by petitioner over the period January 1, 1956 to December 12, 1959. This was an abuse of discretion. It should have been admitted, if not as proof of the claim itself, as a statement of petitioner's claim, under proper instructions to the jury. *American Vitrified Products Co.* v. *Wyer* (C. C. A. Mich., 1955), 221 F(2) 447, 453, 454.

b) To admit evidence of petitioner, by its records, of customers lost over the period of the suit and since the rejections in Roxbury, and the reasons therefor given by petitioner's customers (R 146a-154a, 162a-168a). Motive may be shown as an exception to hearsay evidence rule. 6 *Wigmore, Evidence* (3d Ed. 1940), sec. 1729(2); *Herman Schwabe, Inc.* v. *United Machinery Corp.*, 297 F(2) 906, 914 (C. C. A. 2, 1962).

c) To admit evidence of plaintiff's efficiency, that would permit an inference that losses and damages incurred by plaintiff, testified to by its accountant, were only such as arose from defendants' conspiratorial activities, and to exclude inefficiency as a factor contributing to plaintiff's losses (R 39a). *William H. Rankin Co.* v. *American Bell Porters of U. S.*, 42 F(2) 152, 155 (C. C. A. 2, 1930); *Atlas Building Products Co.* v. *Diamond Block and Gravel Co.*, 269 F(2) 950, 958, 959 (C. C. A. 10, 1959); *Elyria-Lorraine Broadcasting Co.* v. *Lorain Journal Co.*, 298 F(2) 356, 358 (C. C. A. 6, 1961).

For other items of exclusion of evidence, see Appendix "F". It is contended that these exclusions by the District Court, constituted an abuse of discretion.

The District Court quashed *subpoena duces tecum* served on Mr. Vincent Dotolo, asking him to bring with him: delivery tickets for inspection, that would show whether only one cash sale was made by Warren, as stated by Warren in answers to interrogatories (R 66a, 67a, 75a-82a); minute book of Warren companies, that would show relationship among the corporate defendants and the partnership Vindiço, and whether witness was testifying in his own behalf, because of interest in enterprises, or on behalf of others (R 67a); contracts, leases and documents which would show the relationship between Warren corporate defendants and Warren Concrete Products Co. of Warren,

Pa., and the royalties due the latter from the use of spinning machine (R 86a, 206a); documents regarding reorganization of Warren corporate defendants into a new company, Warren Industries, Inc., in order to determine what was the interest of witness in successor enterprise (R 93a); cost data that would show transportation costs per tank, as having a bearing on amount of freight absorption and pricing practices when shipping tanks into geographic area served by plaintiff (R 95a-97a). This was plain error. *Gordon, Wolf Cowan Co.* v. *Independent Halvah,* 9 F. R. D. 700, 702; *Federal Trade Comm.* v. *National Lead Co.,* 352 U. S. 419, 427 (1957); *H. R. Reports,* 2287, 74th Cong., 2d Sess., p. 3 (1936).

Having been thus severely restricted in its proof by the trial Court, when petitioner then rested its case, the respondents both moved for a directed verdict of dismissal. In granting the motion and dismissing the case, the trial judge delivered this peroration (103b):

> "It is my opinion that this case is a glaring example of vicious, harassing and vexatious litigation. The whole history of the case brings that out. It is a case based upon charges of bribery, conspiracy and monopoly, and the facts of this case are completely void of any proof. There is no basis for this case under the Act * * *."

CONCLUSION

It is, therefore, respectfully submitted that this Court has jurisdiction to review this petition on writ of *certiorari;* under Rule 19(1)(b), of the Rules of the Supreme Court of the United States, and that for the foregoing reasons this Court should:

1) Grant *certiorari;*

2) Reverse the judgment below;

3) Remand the case for a new trial;

4) Issue an *ad interim* injunctive order against the respondents[13] which will preserve the *status quo* and protect the petitioner's right to do business in the Township of Roxbury, pending final decision by this Court and retrial by the trial court; and

5) Stay judgment for costs in the Court of Appeals until final determination by this Court and by trial court on remand.

Respectfully submitted,

FRANKEL & FRANKEL,
Attorneys for Petitioner.

LEOPOLD FRANKEL,
Of Counsel.

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[13]This was prayed for in the complaint (R 15a) and denied at the trial level, by dismissal and directed verdict. On appeal the trial court's action was affirmed in all respects, *supra*.

APPENDIX "A"

Letter Opinion of Judge Coolahan

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK 1, N. J.

In re Byram Concretanks, Inc. v. *Warren Concrete Products Co. of N. J., et al*—Civil Action No. 1147-59

LEOPOLD FRANKEL, Esq.
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JOHN R. MILLER, Esq.
BARRETT & MILLER, Esqs.
37 Kings Road
Madison, New Jersey.

Dear Sirs:

At the conclusion of the arguments on the motion to dismiss the above action I stated that it was the Court's opinion that the Sherman Act did not apply against a State or a Municipality or branch of a Municipality, such as a Board of Health. You will recall that I stated I was unable to find any cases on the point but I now refer you to *Parker* v. *Brown*, 317 U. S. at p. 341 (1943).

In that case Mr. Chief Justice Stone fully analyzed the responsibilities of a State with respect to the Sherman Act

and on page 350 he stated, "We find nothing in the language of the Sherman Act or in its history suggesting that its purpose was to restrain a State or its officers or agents from activities directed by its Legislature."

It appears to me that if a State could not be held liable for any of its actions under the Sherman Act that it must necessarily follow neither can a Municipality or an arm of a Municipality, such as a Board of Health, or can its agents be liable for any of its Legislative acts. This point, of course, you will recall, was not raised by any of the parties to this action but was raised by the Court.

While the above point is of significance, the prime motive for dismissing this action is the fact that the evidence was insufficient to show a combination or conspiracy in restraint of trade or a restraint or monopolization of trade or commerce under the Sherman & Clayton Acts. See *Schad* v. *Twentieth Century Fox Film Corp.*, 136 F. 2d p. 991 (3rd Cir. 1943). In fact, there has been no proof of any conspiracy whatsoever.

The test to be applied by the Court in considering a motion for a directed verdict, simply stated, is that the Judge must consider all evidence favorable to the plaintiff as the truth and if there is a tryable issue of fact on just this evidence alone, then the case must go to the jury. This most favorable evidence test can result in a verdict against the plaintiff when he has not proven all the facts of the case comprising his burden of proof. In short, it is not the quantity of the evidence but the presenting of at least some evidence on all aspects of the case necessary to prove plaintiff's claim. In this particular type of litigation the plaintiff is required by statute and case law to prove certain basic principles and absence of proof on any of these issues

must result in the dismissal of a plaintiff's case, as a matter of law.

It is basic to all civil anti-trust actions that the plaintiff allege and prove violation of the anti-trust statutes and that the plaintiff was damaged thereby. The acts of which the plaintiff complains must interfere with the natural flow of Interstate Commerce as well. As was pointed out in the case of *Klor's* v. *Broadway Hale Stores*, 359 U. S. 207 (1959) at page 213, in referring to the defendant's actions in that case; "It interferes with the natural flow of Interstate Commerce. It clearly has, by its 'nature' and 'character', a 'monopolistic tendency'."

This concept was again reiterated in the per curiam opinion in *Radiant Burners* v. *Peoples Gas Co.*, 364 U. S. 656 (1961).

Plaintiff has alleged in the action at Bar that it had been deprived of selling its tanks in Roxbury Township by the conspiracy of the defendants. However, there was a complete failure of proof on this allegation and likewise plaintiff has not sustained his burden of proving that there was any interference with Interstate Commerce at all. The above cited Supreme Court decisions may have given protection to the individual for any violations of the Act, exclusive of their magnitude, but it did in no way change the basic requirements which the plaintiff must prove.

As previously stated, I reiterate that the plaintiff in this case has failed entirely in proving any of the elements which would constitute a violation of the Act and that he was damaged thereby.

Submit appropriate order.

Very truly yours,

JAMES A. COOLAHAN

APPENDIX "B"

Per Curiam Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,368

BYRAM CONCRETANKS, INC.,

Appellant

v.

WARREN CONCRETE PRODUCTS CO. OF N. J., WARREN CONCRETE TANK CO., INC., VINCENT DOTOLO, RICHARD DUNKLE, PATRICK E. HIGGINS, LEONARD J. FARMER, JOSEPH W. ROGERS, HULSE MOONEY, EDISON READ, JOHN W. KLEIN, FRANK M. BERRY, EDWARD C. STIERLI, JOHN EVERLY, E. BLAIR JOHNSON, and BOARD OF HEALTH OF ROXBURY TOWNSHIP

Appeal from the United States District Court
For the District of New Jersey

Argued September 23, 1963

Before MARIS, KALODNER and GANEY, *Circuit Judges.*

Appendix B

OPINION OF THE COURT

(Filed—October 23, 1963)

PER CURIAM:

This is a suit by the plaintiff, a manufacturer of precast concrete septic tanks, against the defendant corporations, who were competitors in that business, the Board of Health of Roxbury Township, Morris County, New Jersey, the Health Officer of that township and the individuals who were members of the Board of Health at various times. The complaint alleged violation of the anti-trust laws and sought treble damages and an injunction. Its institution followed the dismissal with prejudice of a suit arising out of the same controversy which the plaintiff had brought against some of the individual defendants in the Superior Court of New Jersey. After lengthy interlocutory proceedings (see e.g. Byram Concretanks, Inc. v. Meaney, 3 Cir. 1961, 286 F. 2d 170) the case came on for trial in the district court. At the conclusion of the plaintiff's evidence the court dismissed the complaint upon motion of the defendants. The plaintiff thereupon took the appeal now before us.

Our study of the record satisfies us that the district court did not err in its conclusion that the plaintiff had failed to prove its case. We have also considered the plaintiff's contentions that there were trial errors but find them so lacking in merit as to require no discussion.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "C"

Opinion of Court of Appeals—*Byram* v. *Meaney*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,483

BYRAM CONCRETANKS, INC.,
Petitioner

v.

HONORABLE THOMAS F. MEANEY,
Respondent

Petition for Writ of Mandamus

Submitted December 27, 1960

Before GOODRICH, MCLAUGHLIN and FORMAN,
Circuit Judges.

OPINION OF THE COURT

(Filed—January 19, 1961)

PER CURIAM

This is an action for mandamus brought against one of the district judges for the District of New Jersey. The

allegation complains that the district judge unduly restricted the applicant in his interrogatories in a pending litigation and that he acted contrary to what one of his fellow judges had ordered on the same point. We think that this is not a proper case for mandamus, *TCF Film Corp.* v. *Gourley*, 240 F. 2d 711 (3d Cir. 1957). This Court has said many times that mandamus is not to be taken as a substitute for appeal. *E.g., Green* v. *Murphy*, 259 F. 2d 591 (3d Cir. 1958). The district judge was acting in a case which was before him and the action he took was within his authority. If he was wrong the error can be corrected on appeal. The petition will be denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX "D"

Items of Non-Compliance of Warren Tanks

Sec. 5.1 of "Standards" called for liquid capacity tanks of a given size for homes having a given number of bedrooms. Septic tanks delivered by Warren on two occasions where plaintiff had spot-checked them, showed they were short-sized (P-10, 386a, 178a, 221a). This was in clear violation of the section and a fraud on the consumer.

Warren's tanks did not comply with Chap. 199, Laws of 1954, as revealed by "Standards" promulgated by the Commissioner of the New Jersey State Department of Health, in the following respects:

Section of Standards	*Requirements of 'Standards" (indicated by quotations), followed by Violation by Warren Tanks of these Standards (P-3, 379a)*
5.6	"Materials—Septic tanks may be constructed of the following:
	• • •
	"(b) Precast reinforced concrete." A high State official, a Professional Engineer himself, and 3 other professional engineers, pronounced at the trial, that "reinforced concrete" means "reinforced all over" (53a, 57a, 272a, 357a).
	Warren had reinforcing only at the top and bottom of its tanks (P-3, 379a), none in the walls, except for one model, IND-1000 (191a), which is not spun.

Appendix D

Requirements of "Standards" (indicated by Section of Standards) quotations), followed by Violation by Warren Tanks of these Standards (P-3, 379a-381a)

5.10 "* * * the top of all tees or baffles shall be extended to comply with Section 5.12 and in no case shall be less than 8" above the invert of the outlet".

Warren's baffles extended but 7" above the invert of the outlet [See Models 800, 1000 part. and 1000 (P-3, 379a-381a)]

5.11 "Multiple outlets—Where the inside width of the septic tank exceeds 5', multiple outlets constructed in the same manner as provided in Section 5.10 shall be installed as follows:

Inside Width of Tank	*Number of Outlets*
5 to 7 feet	2 "

Every one of Warren's tanks has but one outlet, even though the tanks exceed 5' in diameter (P-3, 379a-381a).

5.12 "Scum storage—the space between the liquid surface and the top of the scum retaining device on the outlet, shall be not less than 15% of the total required liquid capacity."

Warren's tanks (P-3) show the following violations by model numbers:

Appendix D

Model No.	*Gallon Capacity*	*15% of Liquid Capacity*	*Equals*	*Actual[3] Space per Drawings*	*Deficiency*
800	800	4'3" or 51"	7.65"	7"	.65"
1000 part.	1000	4'6" or 54"	8.10"	7"	1.10"
1000	1000	4'6" or 54"	8.10"	7"	1.10"

Section of Standards	*Requirements of "Standards" (indicated by quotations), followed by Violation by Warren tanks of these Standards (P-3, 379a-381a)*
5.13	"Access openings—in single compartment tanks, the access openings shall be located over the inlet. Access openings shall be at least 16" square or 16" in diameter * * *"
	Warren had a single compartment tank with 2 access openings, one over the inlet, one over the outlet. Each opening was only 3" (P-3, 379a-381a), instead of the 16" required as above:

[3] Actual space is determined by [25" — (16" + 1") or 8"]. Since the top of the scum retaining device (the baffle) is 1" from the underside of the tank, this leaves only 7" between the baffle and the top of the liquid surface.

APPENDIX "E"

New Jersey Statutes Directly Involved

N.J.S.A. 58:11-25. Proposed system or facility; compliance with standards of construction

No building permit for the construction of a realty improvement shall be issued by any municipal or other authority in this State nor shall the construction of any realty improvement be begun until the board of health having jurisdiction shall have certified that the proposed water supply system and sewerage facilities for the proposed realty improvements are in compliance with the provisions of this act and the standards for construction of such water supply and sewerage facilities promulgated by the State Department as herein provided and those established by local ordinances, where such local ordinances prescribe higher standards than those promulgated by the State Department. L 1954, c. 199, p. 747 §3.

N.J.S.A. 58:11-33. Covering sewerage facilities; permission

No septic tank, tile field, seepage pit or system or structure designed to provide sewerage facilities to any realty improvement shall be covered from view until the same has been inspected by an authorized representative of the board of health and permission to cover the same has been given by the board or its authorized representative. L. 1954, c. 199, p. 749, §11.

APPENDIX "F"

Other Items of Exclusion of Evidence by District Court

The United States District Court for the District of New Jersey failed:

1. To admit evidence to show that the inception of the conspiracy to restrain trade began with the passage of the March 19, 1953 resolution which approved Keyston (Warren) tank or equal (R187a);

2. To admit into evidence a brochure widely distributed by Warren as binding not only Warren, but Roxbury (Exh. P-11, R388a; R125a). This literature showed how Warren sent the trade into the arms of the inspector by the admonishment in italics: "Be Smart! Consult Your Health Officer First!";

3. To admit declarations made on deposition by a Roxbury in a state suit conspirator during the period of a continuing conspiracy, to be used against all the conspirators in the federal suit, the ground for such refusal being that when these declarations were made, the Warren defendants were not parties to the suit (R35a);

4. To admit evidence of short-sizing of tanks by Warren in Roxbury (R44a; R177a, et seq., R12b) and in Randolph Township (T. 332); that would show conspiracy existed between defendants Warren and Roxbury to violate the law concerning sizes of tanks (Sec. 5.1 of "Standards") (R401a), and that fraud had been committed on customers, in Roxbury and elsewhere;

5. To admit evidence that Byram's tanks complied with Chap. 190, Laws of 1954 (N.J.S.A. 58:11-23 et seq.) and that

Warren's tanks did not, as creating an inference that a conspiracy existed to keep out plaintiff's complying products (R44a; R48a; R55a; R56a), while accepting Warren's non-complying tanks, and that Warren had "paid-off" in order to obtain a special dispensation in Roxbury;

6. To consider the constitutionality of an ordinance adopted by Roxbury on December 18, 1958, passed as part of the conspiracy in restraint of trade, in the sale of septic tanks in Roxbury (R10a, R34a);

7. To admit testimony showing defendant Higgins' salary was raised by Roxbury from $200 to $1,800, over a short period of time (R371a);

8. To permit evidence to be adduced under Par. XII(e) of the complaint of plaintiff, which sets out that Warren used gains in interstate commerce to offset losses in wiping out local competitors (R12a);

9. To admit testimony that the rejections of Byram's tanks received the full support of the Roxbury Board of Health (R372a);

10. To accept in evidence, correspondence and drawings of petitioner, regarding acceptability by F.H.A. of its septic tanks (R301a);

11. To permit plaintiff to show violations of the U. S. Criminal Code, 18 U. S. C. Sec. 709, by Warren, in boldly advertising in its brochure, ACCEPTANCE by Veteran's Administration and Federal Housing Administration, as complying with minimum standards of these agencies (Ex. P-3, R233a, R379a);

12. To permit testimony as to whether Warren was in a position to demand cash for its tanks in Roxbury, where it

was specified, which cash was used in its conspiratorial activities (R227a);

13. To admit the "no answer" given by Warren to interrogatory 75(b) propounded to Warren by plaintiff, as follows: "In the alternative, when can your records be examined with respect to determination of accountability of such cash sales?" "A. (No answer)" (R122a);

14. To admit evidence of a reorganization of Warren after 1959, when Dotolo transferred either the assets of Warren or his Warren shares to a company called Warren Industries, Inc., that would show whether Dotolo was testifying in his own behalf or not (R93a);

15. To permit plaintiff to show that Respondent Rogers was a municipal engineer, not a professional engineer, and was not authorized to prepare and certify specifications for septic tank systems (R351a);

16. To permit showing that in the preparation of about 200 specifications for sewage disposal systems, Rogers failed to fill out the form provided by the Board of Health, showing dimension (R334a);

17. To permit plaintiff to go into conflict of interest of having Rogers serve as a member of the Roxbury Board of Health and as an "engineer" who processed 355 of a total of 1657 applications for permits in Roxbury (R329a);

18. To permit evidence of conflict of interest when Rogers, a member of the Board of Health, had failed to certify 250 specifications he had prepared for private home owners or contractors applying for permits for individual sewage systems in Roxbury, which required certification in compliance with Chap. 199, N. J. Laws of 1954, N.J.S.A. 58:11-23, et seq., (R334a);

Appendix F

19. To permit evidence of conflict of interest of Curtis Williams, Township Engineer, who also prepared specifications for private home owners or contractors, for individual sewage systems in Roxbury, while working for the municipality (R338a);

20. To permit petitioner to offer evidence that two members of the Roxbury Board of Health (R333a) were also employees of Hercules Powder Co. of N. J., a large taxpayer which conducted a dangerous enterprise in the community.

APPENDIX "G"

Warren Defendants' Notice of Motion for Dismissal and Summary Judgment

Please take notice, that the undersigned will move this Court before Honorable Thomas F. Meaney, D. J., at the United States District Court, Federal Building, Newark, New Jersey, on the 24th day of October, 1960, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order for the following relief:

1. To dismiss this action, with costs, pursuant to Rule 12(b) of the Rules of Civil Procedure, on the ground that the court lacks jurisdiction because it appears on the face of the complaint that the alleged claim does not arise under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies as provided under Title 28, Section 1337 of the United States Code.

2. To enter, pursuant to Rule 56 of the Rules of Civil Procedure, a summary judgment, with costs, in the defendants' favor, dismissing the action on the ground that the matter is *res judicata* and that the defendant is entitled to a judgment as a matter of law.

Dated: Oct. 7, 1960

EVANS, HAND, EVANS, ALLABOUGH & AMORESANO
Attorneys for Defendants Warren Concrete Products Co., of N. J., Warren Concrete Tanks Co., Inc., Vincent Dotolo and Richard Dunkle.

By: s/ JOHN W. HAND
A Member of the Firm